No. 56552-8-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MARIA HANES,

Appellant,

v.

DOLLAR TREE STORES, INC., a Foreign Profit Corporation,

Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Dollar Tree Stores, Inc. ("Dollar Tree") has no one to blame for its failure to appear, but itself. Dollar Tree refuses to accept this and tries to foist responsibility on Maria Hanes who broke off settlement negotiations and filed and served a lawsuit that Dollar Tree did nothing about. The Court should not fall for these tactics. There is no dispute that Hanes properly served Dollar Tree with the lawsuit, and Dollar Tree did nothing in *response* to acknowledge that the dispute existed *in court* as required by Washington law. Nor has it shown any excusable neglect or other ground for vacating the judgment, where a routine breakdown in office procedures is not enough to warrant vacating a default judgment in Washington.

Dollar Tree's responsive brief bungles these clear principles of Washington law. It reveals that it completely misunderstood these rules when it received Hanes's properly served lawsuit and took no action to properly defend itself in Washington, relying instead on third party claims handlers in

Kentucky whom it did not even inform about the filed suit. Hanes had every right to pursue her day in court, rather than engage in perpetuity in one-sided settlement talks with a third party with whom she ended negotiations.

Reversal is warranted because this case is controlled by clear precedent showing that vacation was improper.

B. REPLY ON STATEMENT OF THE CASE

Dollar Tree wrongfully tries to add facts to the record that are not present. For example, it claims that "[n]o one disputes that Dollar Tree has a procedure in place for receiving documents served upon its registered agent and transferring these documents to Dollar Tree and its representative and agent, Sedgwick by way of entry into the claim file." Resp't br. at 6 (lack of citation in original). This negative inference is not enough to prove facts. Despite having the burden of proof in its motion to vacate, Dollar Tree made no effort to document its alleged corporate procedures for processing complaints. It offered no evidence that it had safeguards or other measures to

ensure it did not default on a properly processed lawsuit. Dollar Tree failed to establish this "fact."

Likewise, Dollar Tree claims that "an inadvertency" in its procedures for handling lawsuits "led to the suit papers not reaching the [sic] Dollar Tree and its claim file." Resp't br. at 6. Elsewhere it asserts that this was a "one-off" mistake. Resp't br. at 43. But *nowhere* in the record did Dollar Tree establish any fact about the "inadvertency" or "inadvertencies" that occurred after it was served with the lawsuit, or in how many other cases this same mistake has occurred. Its registered agent did not offer a declaration, nor did a corporate officer, nor did any legal representative. Only an employee from Sedgwick testified that the lawsuit was not mentioned in his own "claim file." CP 113. No person testified to how or why this fact was missing from Sedgwick's "claim file." For all the Court knows, the registered agent intentionally withheld the lawsuit or Dollar Tree directed that it not be sent to Sedgwick. Negative inference is not enough to prove the "facts" Dollar Tree alleges.

In truth, Dollar Tree reveals that it is entirely to blame for its failure to appear. It has created a fractured system through which it employs a "unaffiliated process receiving company, Corporation Service Company" to act as its registered agent in Washington, resp't br. at 6, and appoints claims handlers at Sedgwick, a company in Kentucky, *e.g.*, CP 121, to manage pre- (and apparently post-) litigation claims. Presumably, it chooses this structure because it is more profitable than maintaining local offices and/or hiring experienced legal counsel, preferably local counsel with knowledge of Washington's Civil Rules and case law regarding the need to appear and acknowledge disputes "in court." *Morin v. Burris*, 160 Wn.2d 745, 756, 161 P.3d 956 (2007).

C. ARGUMENT IN REPLY

(1) Sedgwick's Involvement Was Irrelevant Once Hanes Filed Her Lawsuit and Served Dollar Tree

For the bulk of its response, Dollar Tree argues that Sedgwick's actions absolve it of responsibility, including the

responsibility to appear or at the very least acknowledge that a dispute exists "in court." *Morin*, *supra*. Dollar Tree is wrong; third party, non-lawyers cannot stave off a default of a properly served lawsuit.

Dollar Tree cannot unilaterally rely on a third party, non-lawyer to serve as its agent when a lawsuit has been filed. Non-lawyers cannot practice law in Washington; it is a crime. RCW 2.48.180. Practicing law "includes but is not limited to":

> (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
>
> (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
>
> (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
>
> (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

GR 24. Our Supreme Court recently made it clear that the "unlawful practice of law…is a strict liability crime" in part because it is a "public welfare offense," and the harm to the public "can be significant." *State v. Yishmael*, 195 Wn.2d 155, 163-72, 456 P.3d 1172 (2020).

Whatever limited prelitigation authority Sedgwick had, it lacked any authority to represent or negotiate "legal rights or responsibilities" on behalf of Dollar Tree once the lawsuit was filed. *Id.* Dollar Tree had to hire a lawyer to appear (formally or informally) by acknowledging a dispute existed *in court* and answer the complaint like any other litigant. Indisputably, it failed to do so. It did not even *inform Sedgwick* about the lawsuit because of its own failure in its fractured corporate structure and procedures, structure and procedures *it designed* presumably because they are cheaper than retaining competent, local legal counsel.

As discussed in Hanes's opening brief, courts have already held that there is no duty to engage with or inform a

third party, like an insurer, of a lawsuit once it is filed. *Morin*, 160 Wn.2d at 759 (A plaintiff has "no duty to inform [a nonparty insurance representative] of the details of the litigation" once filed); *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993) ("[W]e do not believe plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment."); *Aecon Bldgs., Inc. v. Vandenmolen Constr. Co.*, 155 Wn. App. 733, 739-41, 230 P.3d 594 (2009) (discussing the holding in *Gutz* that a plaintiff has no duty to inform a defendant's insurer about litigation, except to refrain from actively concealing litigation during ongoing settlement discussions). Dollar Tree goes to great lengths to point out that Sedgwick is not an insurer, resp't br. at 27-28, but Sedgwick is also not a legal representative, capable of representing Dollar Tree in a lawsuit or otherwise practicing law on its behalf. GR 24, *supra*. It is a third party claims handler. Hanes had no obligation to inform Sedgwick of the legal proceedings once

she ended settlement negotiations and filed her lawsuit.

The mental gymnastics Dollar Tree engages in are nonsensical, with Dollar Tree repeatedly referring to Sedgwick's actions or knowledge as its own. For example, Dollar Tree states that "Dollar Tree does not claim it was aware of litigation and appeared, but claims that it was *not aware* of the litigation and equitable considerations merit vacating default." Resp't br. at 19 (emphasis added). Not true. Dollar Tree *knew* about the ligation as a matter of law, as its registered agent was properly served with a lawsuit. That it failed to put safeguards in place or relied on unreliable[1] third parties to

[1] Dollar Tree was wrong to rely on Sedgwick, who could have been liable for malpractice had it been able to represent Dollar Tree as a lawyer. *See Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P.3d 1068 (2002) (to the extent a claims adjuster can perform any service resembling practicing law it must abide by the standard of care of a practicing attorney). Dollar Tree claims that Sedgwick merely "assum[ed] Ms. Hanes did into intend to pursue the claim or litigation" when she ceased settlement conversations near the statute of limitations deadline, so it closed its file. Resp't br. at 8 n.1. A competent legal representative would have known to closely monitor for a filed lawsuit near the statute of limitations deadline, a critical

protect against default is entirely its own fault.

Dollar Tree never appeared, formally or informally, and so it was not entitled to notice of the default proceedings. The participation of a third party claims handler, with whom Hanes ended prelitigation settlement discussions, is irrelevant. This is especially true because never once did anyone from Sedgwick reference litigation or anything else conveying that they were aware of the dispute *in court*. CP 169; *Morin*, 160 Wn.2d at 756 (merely expressing an "intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a dispute exists and instead acknowledge that a dispute exists *in court*.") (emphasis in original).

Dollar Tree offers no argument in response to Hanes's argument that vacating default was bad public policy. Appellant's br. at 23. Again, Sedgwick claims handlers cannot

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juncture, not merely assume Hanes decided to drop her claim and not follow up to see whether she served a lawsuit.

practice law, and doing so poses a threat of "significant" harm to the public welfare. *Yishmael*, 195 Wn.2d at 163-72. Hanes had a right to end settlement talks with Sedgwick and pursue her day in court. She should not be hounded with endless calls from third parties sent by a sophisticated corporate defendant like Dollar Tree to stave off default. Rather, Dollar Tree had to meet the most basic obligation of a legal defendant, which was to "respond to [a served] summons and complaint or suffer the consequences of a default judgment." *Morin*, 160 Wn.2d at 757. It did not do so and vacating a proper default over a year later was improper.

(2) Grounds for Relief Under CR 60(b)(1) For Excusable Neglect Were Time Barred

As discussed in Hanes's opening brief, relief from default judgment under CR 60(b)(1) for mistake, inadvertence, or excusable neglect must be made within a reasonable time "not more than 1 year after the judgment." CR 60(b). This is a strict deadline that may not be extended. CR 6(b)(2). Dollar Tree's

arguments about alleged irregularities in the proceedings, excusable neglect, and Dollar Tree's defenses to liability should have been ignored because it moved for relief more than one year after the judgments were entered.

Dollar Tree is wrong that the factors a trial court must apply when deciding to vacate a default judgment under CR 60(b)(1) is some separate test, untethered by a one-year time limitation, and that it "applies only to default judgments" that were obtained by mistake, inadvertence, or excusable neglect. Resp't br. at 33. Dollar Tree claims that the four factor test is separate from and does not "live[] within CR 60(b)(1)." Wrong. As this Court has plainly stated:

> A party *moving to vacate under CR 60(b)(1)* must show that (1) there is substantial evidence supporting a prima facie defense; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the defendant acted with due diligence after notice of the default judgment; and (4) the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Ha v. Signal Elec., Inc., 182 Wn. App. 436, 448-49, 332 P.3d

991 (2014), *review denied*, 182 Wn.2d 1006 (2015). These factors apply to anyone "moving to vacate under CR 60(b)(1)" and such motions are subject to the one-year limitation period in the plain language of that rule. *Id.*

Lacking authority to support its argument Dollar Tree, invents support. It cites *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005), resp't br. at 34, but the *Topliff* court expressly rooted its decision in CR 60(b)(11), not CR 60(b)(1), which would have been time-barred because the moving party brought its motion after one year.[2] *Id.* at 924-25. Dollar Tree also cites *Morin*, claiming the court "consider[ed] application of *White* to the *Matia* case where [the] motion was filed more than a year after default judgment." Resp't br. at 34. But the moving party in *Matia*, did not raise CR 60(b)(1) as a

[2] Dollar Tree omits any argument over CR 60(b)(11), thereby waiving this issue in this Court. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (A respondent's failure to address the argument of an appellant amounts to a concession of the point).

ground for vacation, specifically because it was time-barred. This was not addressed in the Supreme Court opinion, but obvious from the Court of Appeals' decision consolidated with others on review to the Supreme Court in *Morin*. *See Matia Inv. Fund, Inc. v. City of Tacoma*, 129 Wn. App. 541, 549, 119 P.3d 391(2005)[3] (moving party sought to vacate under "CR 60(b)(4), (5), [and] (11)"); *id.* at 397 ("Because the City filed its motion to vacate over a year after the order for default judgment, the trial court could not set aside the order under CR 60(b)(1), which normally would have provided a basis for the City's "mistake[ ]" or "excusable neglect.") (Bridgewater, J., dissenting). This Court should not tolerate Dollar Tree's misrepresentation of precedent.

Dollar Tree repeatedly references the equities of the situation that led to its arguments being time-barred, but, again, Dollar Tree has no one to blame for its failure to appear but

[3] *rev'd sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

itself. And it does not matter that Hanes waited one year before collecting on the default judgment. The same conduct by plaintiffs in *Morin* had no bearing on the Court's analysis, 160 Wn.2d at 750-53, nor did it in the several other cases cited in Hanes's opening brief. Appellant's br. at 24 n.3 (citing *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.* 176 Wn. App. 185, 195, 312 P.3d 976 (2013), *review denied*, 179 Wn.2d 1010 (2014) (citing *Friebe v. Supancheck*, 98 Wn. App. 260, 264, 267, 992 P.2d 1014 (1999)); *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn. App. 280, 285-86, 673 P.2d 634 (1983), *review dismissed*, 103 Wn.2d 1024 (1984)). This common tactic is not inequitable in Washington and part of the consequences a properly served party must suffer for failing to appear or defend a lawsuit. *Id.*

Dollar Tree's arguments under CR 60(b)(1) were time-barred, and to the extent that the trial court relied on them (which we cannot know because it entered no findings) it committed legal error.

(3) Even If Dollar Tree Had Brought a Timely Motion Under CR 60(b)(1), it Failed to Establish That it Deserved Relief

Even if Dollar Tree had brought a timely motion for relief for excusable neglect, inadvertence, or mistake under CR 60(b)(1), it failed to establish that it was entitled to relief. It failed to carry its burden of showing that: "(1) there is substantial evidence supporting a prima facie defense; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the defendant acted with due diligence after notice of the default judgment; and (4) the plaintiff will not suffer a substantial hardship if the default judgment is vacated." *Ha, supra*.

(a) Dollar Tree Showed No *Prima Facie* Defense

Dollar Tree failed to show a *prima facie* defense, let alone a "strong or virtually conclusive" one as is required when default comes from inexcusable neglect like the routine breakdown in office procedures that occurred here. *TMT Bear*

Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 206, 165 P.3d 1271 (2007). Dollar Tree does not dispute this "strong or virtually conclusive" standard, or that it applies to this case.[4] Resp't br. at 35-38. Instead, it argues that it presented evidence from a single employee who was not present to show it had no notice of a tripping hazard and that Hanes could be contributorily negligent. Resp't br. at 36-37. Dollar Tree mistakes the law and the facts. Hanes alleged that Dollar Tree *created* the dangerous hazard by negligently placing merchandizing pegs on the floor. CP 4, 35. A store can be liable for *creating* such a hazard without any notice.

In *Pimental v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983), a case in which a can of paint fell on the plaintiff's

[4] Again, there is no way to know whether the trial court applied the correct legal standard; it made no record related to its decision. A trial court "necessarily abuses its discretion if it applies the incorrect legal standard." *Kreidler v. Cascade Nat. Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014) (quotation omitted).

foot, the Supreme Court adopted the analysis of the Court of Appeals in *Ciminski v. Finn Corp., Inc.*, 13 Wn. App. 815, 537 P.2d 850, *review denied*, 86 Wn.2d 1002 (1975), holding no notice of the hazard is required if the nature of the business's operations made an unsafe condition foreseeable. *Id*. at 49. Moreover, where, as here, the business proprietor itself created the unsafe condition, *liability may attach even if the proprietor had no notice of the hazard*. *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 454, 805 P.2d 793 (1991). *See also*, *Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 303 P.2d 294 (1956).[5] Notice to Dollar Tree of the particular hazard that injured Hanes was unnecessary precisely because *its employees created the hazard*. Dollar Tree presented no evidence to the contrary, it

[5] *See also, Newell v. Home Depot U.S.A., Inc.*, 2014 WL 4264807 (E.D. Wash. 2014) (denying summary judgment to store where a paint bucket fell on a plaintiff; Home Depot's own negligence); *Craig v. Wal-Mart Stores, Inc.*, 197 Wn. App. 1006, 2016 WL 7166594 (2016), *review denied*, 188 Wn.2d 1004 (2017) (reversing summary judgment for store where garden center operations made possibility of a rattlesnake a foreseeable hazard).

could not present video evidence and no witness or employee on duty when Hanes fell testified.

Nor is contributory negligence a "strong or virtually conclusive defense." Stores must refrain from leaving hazards in their aisles that could injure invitee customers, even ones visible to the customer. *Griswold v. Fred Meyer Stores, Inc.*, 18 Wn. App. 2d 1063, 2021 WL 3619918 (2021) (negligently placed dolly that injured customer in store aisle is actionable). Dollar Tree admitted that negligently placed merchandizing pegs were a known danger to invitees, which is why it normally required them to be kept in a box and not deposited on the floor to create a "trip hazard." CP 140.

Lastly on defenses, Dollar Tree claims without citation to the record that it presented defenses to damages, because Hanes received treatment on "body parts that she does not describe as implicated in the fall" and because it presented a "persuasive case against…noneconomic damages." Resp't br. at 37-38. These bare assertions are not enough to vacate a default

(especially one entered over a year prior). Hanes's doctors testified that all her treatment was necessary and attributable to her fall. CP 39-41. And she documented the 90 weeks of "tremendous pain" she endured in sworn testimony. CP 35-37. Dollar Tree presented *zero evidence* to rebut this fact. No doctor, no expert, no nothing. Dollar Tree failed to present an adequate defense, and vacation was unwarranted.

(b) Dollar Tree Offered Zero Evidence of Excusable Neglect

Like its failure to document any reasonable defense, Dollar Tree completely failed to show that its failure to appear was excusable. Again, no Dollar Tree attorney, registered agent, officer, executive, or employee testified or otherwise explained why it failed to appear and answer the complaint. No one from any of its fractured corporate representatives could explain why the served complaint was not answered or even forwarded to Sedgwick. Only a third party claims handler testified that for some unknown reason, the lawsuit was not in

his "claim file." CP 113. This lack of evidence is fatal, because when "a company's failure to respond to a properly served summons and complaint [is] due to a breakdown of internal office procedure, the failure [is] not excusable." *TMT Bear Creek*, 140 Wn. App. at 212.

Dollar Tree cites *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004), as though the case were its saving grace. *See* resp't br. at 34-35 n.10, 38-44. It is not. The company in *Showalter* extensively documented the circumstances that led to its failure to appear. It submitted declarations from multiple employees who testified exactly how a single lawsuit was not transferred to the proper legal department because of a miscommunication between a particular paralegal, an internal claims administrator, and a safety and risk manager. 124 Wn. App. at 509, 514. The company meticulously documented how the paralegal departed from established procedures on this one, identifiable occasion, leading to unintentional default. *Id.* And the company went so

far so to explain in a declaration that as a result of this one-time error, "internal procedures have been changed so that [manager of the safety and risk department] is never to receive any original copies of suit papers, and they are to be automatically forwarded personally to [internal claims administrator], no matter what." *Id.* at 514.

Dollar Tree came *nowhere near* this level of documenting its mistake or excusable neglect. It failed to do so at all, and one can only guess whether it was a mistake, a purposeful tactic, or something else. Nor has it attempted to explain how it would avoid this failure in the future. Even if it were not time-barred, Dollar Tree is not entitled to relief under CR 60(b)(1).[6]

[6] The other two factors are discussed in Hanes's opening brief – Dollar Tree was not all that speedy in moving to vacate, especially considering how little evidence it offered, and Hanes is prejudiced by having to relitigate this claim. Appellant's br. at 32-34. Nothing in Dollar Tree's response is new or persuasive, so further discussion of these lesser factors is unnecessary.

(4) Dollar Tree Has Waived its Arguments for Relief Outside of CR 60(b)(1)

Dollar Tree limits its responsive briefing to relief under CR 60(b)(1), and therefore it has waived its arguments for the other avenues of relief that it once argued, as addressed in Hanes's opening brief. *Ward*, 125 Wn. App. at 144 (respondent's failure to address the argument of appellant amounts to a concession of the point).

It presents no argument in its brief for relief under CR 60(b)(11), which Hanes addressed in her brief at 34-36. Thus it has waived this issue. And it only discusses relief under CR 60(b)(4) for misconduct or misrepresentation of another party – which Hanes addressed in her brief at page 21-23 – in a footnote. Resp't br. at 23 n.5. This does not preserve an issue for this Court's review. *E.g.*, *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (argument raised in footnote will not be addressed).

At any rate, Dollar Tree is not entitled to relief under CR

60(b)(4) or (11). Appellant's br. at 21-23, 34-36. Hanes's conduct was not improper – she had every right to end settlement discussions with a third party and file a lawsuit. She misrepresented nothing to the trial court when she moved for default after Dollar Tree failed to appear. And default did not result from extraordinary circumstances within the meaning of CR 60(b)(11).

This Court should reverse because Dollar Tree established no ground for relief from the properly obtained default.

D. CONCLUSION

Reversal is warranted. Dollar Tree never appeared and must suffer the consequences of its utter failure to defend itself *in court*. Dollar Tree's CR 60 arguments were time-barred, meritless, or both, and many have been waived on appeal. The trial court committed clear error by ignoring these established legal standards, and the default order and judgment should be reinstated.

This document contains 4,068 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of August, 2022.

Respectfully submitted,

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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